

**FOR THE NORTHER DISTRICT OF OHIO,
WESTERN DIVISION**

ENVIRONMENTAL LAW &
POLICY CENTER,

and

BOARD OF LUCAS
COUNTY COMMISSIONERS,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Defendants.

CONSOLIDATED CASE Nos.

3:19-cv-00295

3:19-cv-00873

Judge James G. Carr

ORDER

On April 25, 2023, the parties to these consolidated actions – Plaintiffs, Environmental Law & Policy Center (“Center”) and the Board of Lucas County Commissioners (“Commissioners”); Defendant, United States Environmental Protection Agency (“EPA”); and Intervening Defendant, the State of Ohio (“State”) – filed their Joint Motion for Enforcement of Consent Decree. (Doc. 73).

On review of the parties’ Motion and the Consent Decree, I find both well taken. Accordingly, I grant their Motion and concurrently sign and enter the Consent Decree.

The Consent Decree brings an end to litigation under the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251, *et seq.* (1972) that has spanned two weeks shy of six years. The consolidated Complaints in these cases are the final chapter of Plaintiffs’ persistent, unyielding quest to obtain joint commitment from the EPA and the State to undertake a crucial first step towards the restoration of Lake Erie’s Western Basin.

On May 17, 2017, the Center, Advocates for a Clean Lake Erie, and several private persons, filed suit against the EPA, then EPA Administrator, Scott Pruitt, and Robert Kaplan, Acting EPA Region V Administrator. The Commissioners intervened in the lawsuit. Participating as *amici curiae* were the cities of Toledo and Oregon, the Lake Erie Foundation, and Guardians of Grand Lake St. Mary's. Together, they sought to accomplish today's result. See *Environmental Law and Policy Center, et al. v. United States Environmental Protection Agency, et al.*, Case No. 3:17-cv-01032.

The CWA requires states to identify "impaired waters," within their borders for which existing pollution controls are not stringent enough to meet water quality standards. 33 U.S.C. § 1313(d)(1)(A). States must prepare total maximum daily loads ("TMDL")¹ for these waters." 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(d)(1).

In that first case, Plaintiffs sought a declaration that the EPA violated the CWA for failing to perform its mandated duty to approve or disapprove, within thirty days of submission, the Ohio EPA's § 303(d) list, also known as an "Impaired Water List." Plaintiffs further asked for injunctive relief to compel Defendants to do so.² However, the EPA's decision to withdraw its approval of Ohio's 2016 List, finding it not fully consistent with the requirements of § 303(d), rendered Plaintiffs' case moot, so Plaintiffs voluntarily dismissed their initial Complaint.

Six days later, Plaintiffs notified the Court that they had filed a related case under the CWA and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.*. The second suit,

¹ TMDLs are plans that set the quantity of a pollutant that may be introduced into a receiving water without exceeding applicable water quality standards, taking into account seasonal variations and an adequate margin of safety. 33 U.S.C. § 1313(d)(1)(C). (Doc. 73-1, pgID 7038).

² States must establish a priority ranking system for impaired waters on the § 303(d) list, when considering the severity of the pollution and the uses of the water. 33 U.S.C. § 1313(a); 40 C.F.R. § 130.7(B)(4). The priority ranking must identify those waters that are targeted for TMDLs. 40 C.F.R. § 130.7(b)(4). States also must maintain a continuing planning process to comply with the CWA. 18 U.S.C. § 1313(e). A state "assemble[s] and evaluate[s] all existing and readily available water quality-related data and information" concerning these impaired waters. 40 C.F.R. §§ 130.7(d)(2), (b)(5). If the EPA approves the list, the agency must incorporate the TDMLs into planning processes. 33 U.S.C. § 1313(d)(2). If it disapproves the list, it steps into the state's shoes and must establish TMDLs within 30 days. *Id.*

which the Center had filed on on July 18, 2017, challenged the EPA's decision to withdraw its decision approving the State's submission of Ohio's 2016 Impaired Waters List. *See, Environmental Law and Policy Center, et al. v. United States Environmental Protection Agency, et al.*, Case No. 17-cv-01514.

The parties filed various Motions and Counter-Motions. After the matter was fully briefed, I found Plaintiffs' argument – that the EPA's decision to approve Ohio's 2016 List was arbitrary and capricious – “compelling.” This was especially so in light of the EPA's previous forgiving tolerance of Ohio's incomplete submissions for 2012 and 2014. *Env't L. & Pol'y Ctr. v. United States Env't Prot. Agency*, No. 3:17CV01514, 2018 WL 1740146 (N.D. Ohio Apr. 11, 2018).

Nonetheless, on April 11, 2018, I had to deny Plaintiffs' Motion for Summary Judgment, which required remanding the case back to the EPA for an administrative ruling, The effect of my decision was to compel the agency to either approve or disapprove Ohio's 2016 Impaired Waters List within thirty days of the date of my Order. *Id.* at *12. *See*, 33 U.S.C. § 1313(d)(2); 5 U.S.C. §706(2)(A).³

On October 3, 2018, I granted Defendants' Counter-Motion for Summary Judgment. *See, Env't L. & Pol'y Ctr. v. United States Env't Prot. Agency*, 349 F. Supp. 3d 703 (N.D. Ohio 2018). Ultimately a Notice of Satisfaction of Judgment resolved the case, resulting in closure of the case on September 8, 2020.

Though as of April 11, 2018, the State had yet to intervene, the Ohio EPA had submitted an amended 2016 § 303(d) List, adding three new assessment units for Lake Erie's open waters

³ This is because the APA authorizes court judicial review of administrative actions only when there is no other adequate remedy. As I noted, “Defendants' legal maneuvering prevents me from ruling on the merits in this case, but Ohio's ‘incomplete Section 303(d) List submission remains pending before U.S. EPA for either final approval or disapproval.” *Env't L. & Pol'y Ctr. v. US Env't Prot. Agency*, 2018 WL 1740146 at *12.

and declaring all three impaired. The EPA approved Ohio's amended 2016 submission on May 10, 2018 - just within the thirty-day deadline. *Env't L. & Pol'y Ctr. v. United States Env't Prot. Agency*, 349 F. Supp. 3d 703, 708 (N.D. Ohio 2018).

In Ohio's 2018 Impaired Water List, the State identified the Western Basin of Lake Erie - in full - as impaired for the human health beneficial use and needing a TMDL. Remarkably, the Report assigned a "low priority" for "Ohio EPA-initiated TMDLs." (Doc. 1; Doc. 73-1, pgID 7039). For the three open water assessment units, their use attainment status was listed as unknown due to insufficient data. (Doc. 73-1, pgID 7039). The EPA approved the State's 2018 § 303(d) List in July 2018. (*Id.*).

On February 7, 2019, the Center and Advocates for a Clean Lake Erie filed the instant and third case against the EPA, its Administrator, Andrew Wheeler, and then Acting Region V Administrator, Cathy Stepp, The Complaint sought declaratory and injunctive relief. See *Environmental Law & Policy Center, et al. v. United States Environmental Protection Agency, et al.*, Case No. 3:19-cv-00295.

Plaintiffs claimed the EPA's approval of the State's priority ranking was arbitrary and capricious in violation of the APA. Plaintiffs further asserted the CWA mandates that I order the EPA to prepare a TMDL for Lake Erie. Plaintiffs also ask me to overturn the EPA's acceptance of the State's refusal to do so. (Doc. 1).

Participating as *amici curiae* are the City of Toledo, the City of Oregon and, in response to my invitation, the Ohio EPA.⁴

⁴ The State's status in the case changed from *Amicus* to Intervening Defendant. The Ohio EPA filed a Motion to Intervene in the suit (Doc. 71), which was granted on March 7, 2023. (See Non-Document Order of same date).

On April 18, 2019, the Commissioners, following the Center's lead, filed the fourth suit, seeking equitable relief under the CWA and the APA. They specifically seek an injunction compelling Defendants to develop a basin-wide TMDL for Western Lake Erie. The TDML must, they contend, address all harmful nutrients, sufficient to remedy the impairment of the lake. See *Board of Lucas County Commissioners v. Unites States Environmental Protection Agency, et al.*, Case No. 19-cv-00873. (Doc. 1).

The two cases are consolidated. Collectively, Plaintiffs allege the EPA's "inaction has abetted the equally long-standing failure of the Ohio [EPA] to discharge its legal duties under the CWA." They contend this joint inaction and inattention has caused an alarming decline in the water quality of Lake Erie. (19-cv-00873, Doc. 1, pgID 2).

On November 13, 2019, I denied the Defendants' Motion to Dismiss (Doc. 18). *Env't L. & Pol'y Ctr. v. United States Env't Prot. Agency*, 415 F. Supp. 3d 775 (N.D. Ohio 2019). (See also, Nov. 13, 2019 Order - Doc. 34). The parties filed Counter-Motions for Summary Judgment (Docs. 43, 45). I heard oral arguments on their Motions on July 24, 2020 and July 30, 2020, and they have been decisional since then.

Following installation of a new Director at the EPA, I held a status/scheduling conference on March 22, 2021. At that conference, I stated:

I will tell you, and I will jump even further to the point and say quite simply this is not a case that can be resolved judicially. It either is going to be resolved through settlement, or it will be a matter at least of two years, whatever decision I reach, it is going to get appealed. Whatever result is reached, it may come back to me, it may go up to the Supreme Court. But I think it is fair to say it will be at least two more years of really, as far as I can tell, and I may be mistaken, of really no significant action for more than a dozen years. This problem has been known about since the 1990s, when the general assembly about 15 or years or more ago learned, you know, said there's phosphorus in Lake Erie, it's bad, it's causing all kinds of problems and band phosphorus in laundry and dishwashing detergent. As far as I can tell, the problem has gone largely unattended to ever since.

And, sure, I can reach a decision. I get paid to reach decisions, but it is not going to be the end of it. And for anybody interested in a real meaningful effort to resolve the growing problems in Lake Erie and their consequences, I think the only way that's going to happen is for the U.S. EPA, the plaintiffs, and the State of Ohio to work cooperatively towards accomplishing a meaningful outcome and resolution. I can make a decision, but it's just going to kick the can down the road for another two years, at least, at least.

You've basically heard what I wanted to say, and it seems to me that the most appropriate request for me to make is to ask Mr. Dertke to... raise the issue within the administration [*sic* Agency] and I would hope with folks representing the new administration and the new EPA ... Administrator.... I will be very candid with you.

You've heard what I've said. It's got to be tended to administratively, it really does. Even if I were to grant the modest relief that I can to the plaintiffs, the EPA is going to appeal. And, obviously, if I rule in favor of the EPA, plaintiffs are going to appeal and nothing is going to get done, it really isn't, it hasn't been. And I know that the people from the Ohio [EPA] are offended to hear me say it, but kind of progress that should have begun following the 2014 acceptance of the report really hasn't occurred. And there are various reasons for that, I understand. But the problem is too big and it's certainly too big for a Court somehow to take over.

I'm not equipped to do that as a Court. I will do my job as best I can because it is my job. But this is simply not something that is amenable to judicial resolution to the extent that the problem needs to get seriously and carefully and thoroughly addressed, and time is of the essence.

(Sealed Transcript of March 22, 2021 Status Conference, pp. 2-4; 9-10)

Most fortunately, the parties heeded my admonition. In light of the pendency of the decisional Summary Judgment Motions, it would not have been appropriate for me to participate in the ensuing settlement negotiations.

Accordingly, I called upon my colleague, Hon. Judge Dan Aaron Polster, to oversee the negotiations and work with the parties. Though my request came in the midst of his preparation of a bellwether trial in his massive multi-district opioid litigation – a vastly demanding and time-

consuming undertaking – Judge Polster readily agreed to do what he could to reach the result that is before me today.

The parties – and even more so – those millions of Ohio residents, who depend on and deserve a cleaner and healthier Lake Erie – should be grateful beyond words for Judge Polster’s time-consuming and strenuous effort and work. I certainly am.

Simply put: But for his efforts and unflinching persistence – this case would have gone forward to summary judgment for one party, and on to an appeal to the Sixth Circuit by the other, and, in all likelihood, a further appeal to the Supreme Court. The steps the State has already undertaken in accordance with the Consent Decree would have been, at best, postponed until all judicial proceedings and further appeals had finally come to an end.⁵

In the meantime, agricultural runoff – and the main source of polluting nutrients that have caused harmful algae blooms in the Lake for more than twenty-five years – would, at best, have continued unabated. At worst, they would have continually increased.

Credit for today’s result is, also most certainly due, to the lawyers for all parties. Each attorney has consistently displayed the highest degree of professional competence and dedication to his or her client’s cause. The better the lawyer, the harder the decisions judges have to make.

The professional advocacy each attorney displayed in their written submissions, in their oral arguments, and in chamber conferences and the courtroom mattered, as is always so in vigorously contested litigation of far-reaching consequences. The professional and personal

⁵ By hindsight, I may have underestimated the delay from my (now unnecessary) adjudication of the Counter-Motions for Summary Judgment and any appeal to the Sixth Circuit. Not factored into my two-year estimate is an *en banc* rehearing in that Court. Given the nature of this case, and the fact that my dismissal order involved the *then* most recent application of an evolving doctrine that, candidly, represents an incursion into matters over which the EPA should exercise its jurisdiction and authority, I am confident that further litigation would, for an incalculable period of time, have postponed any action *vis-a-vis* the Maumee River Watershed and the Western Basin of Lake Erie.

qualities, which each lawyer brought to this case, mattered even more when they worked with Judge Polster to create the Consent Decree that I endorse today. It is clear from the comments Judge Polster has repeatedly made to me that, when the willingness to conciliate supplanted the impulse to contest and contend, the professional and personal qualities I had observed were again on full display. Just as without Judge Polster's work, today's resolution would not have occurred, had the lawyers been less capable and less committed to achieving the best possible result for their clients, and the public.

Finally, I want to give credit to the State of Ohio, its Governor, Mike DeWine, and its Environmental Protection Agency. The State first responded to my invitation to participate, as a non-party, *amicus curiae*. Then it joined in and, literally, signed on to do the work that lies ahead.⁶ No plaintiff's complaint, no summons of mine, no Marshal's appearance at the Statehouse door could have made them a part of this – or any other – case. Without the State's willingness to participate in the work leading to the Consent Decree, whatever agreement the Center, the Commissioners, the EPA, and its officials, might have reached, would have been far less substantial and far less significant.

Though the work that today's agreement brings is but a first step, it is a step that has to be taken. How many more steps lie ahead, and how long they will take, is beyond even guessing. But there's reason to hope that, in time, the Maumee River will no longer display, as it has for countless summers, a loathsome foul and slimy green surface as it flows through Toledo on its constant and irresistible course on to Lake Erie's Western Basin.

⁶ On February 13, 2020, the State – prompted, undoubtedly, by this litigation – had already started the *sine qua non* initial work by submitting its 2020 Impaired Water List, which included the shoreline and open waters of the Lake Erie Western Basin and the shoreline of the Lake Erie Islands as impaired for public drinking water and both shorelines as impaired for aquatic life, assigning the waters as “medium priority.” The EPA approved the State's § 303(d) List on May 29, 2020. (Doc. 73-1, pgID 7040).

Conclusion

I have reviewed the parties' Joint Motion and their proposed Consent Decree. I find both well-taken in all respects.

Accordingly, it is hereby

ORDERED THAT:

1. The parties' Joint Motion for Entry of Consent Decree (Doc. 73) be, and the same hereby is granted;
2. By concurrently endorsed signature, I approve the Consent Decree; and
3. The parties' pending Counter-Motions for Summary Judgment (Doc. 43 and Doc. 45) be, and the same hereby are, deemed withdrawn as moot.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge